The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

YIM, et al.,

Plaintiffs,

v.

CITY OF SEATTLE,

Defendants.

CASE NO. 2:18-cv-736-JCC

CITY OF SEATTLE'S COMBINED OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT

NOTED ON MOTION CALENDAR: Friday, January 11, 2019

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION AND RELIEF REQUESTED

Seattle residents with criminal histories—disproportionately people of color—face significant barriers to accessing housing. After Defendant City of Seattle comprehensively analyzed the problem, it adopted the Fair Chance Housing Ordinance ("Ordinance") to reduce those barriers. Plaintiffs—Seattle landlords and an organization representing them—challenge the Ordinance's prohibitions on landlords requiring disclosure of, and inquiring about, prospective tenants' criminal history, and using that history to deny tenancy. Plaintiffs claim the first two prohibitions violate landlords' free speech rights, and the use prohibition violates their substantive due process rights, under the U.S. and Washington Constitutions.

Plaintiffs are mistaken. The prohibition on disclosure of and inquiry about criminal history is a regulation of commercial conduct, not speech, which does not implicate the First Amendment. Even if it did, the prohibition satisfies the intermediate scrutiny governing commercial speech regulation, and would withstand the strict scrutiny Plaintiffs mistakenly assert controls their claim.

Plaintiffs fail to carry their burden of proving a substantive due process violation. Federal courts and the Washington Supreme Court subject apply the deferential "rational basis" analysis, which the Ordinance satisfies. Even if Plaintiffs' Washington claim were subject to the discredited "undue oppression" analysis they mistakenly invoke, they could not carry their burden.

The City respectfully asks this Court for summary judgment on Plaintiffs' claims. If this Court sustains either of them, the City asks this Court to sever and uphold the rest of the Ordinance, which Plaintiffs do not challenge.

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II. STATEMENT OF UNDISPUTED FACTS[1]

A. Seattle residents with criminal histories—disproportionately people of color—face significant barriers to accessing housing.

About 30% of adults in the United States have an arrest or conviction record[2] and nearly half of all children in the U.S. have one parent with a criminal record.[3] Approximately 30% of Seattle residents over the age of 18 have an arrest or conviction record and seven percent have a felony record.[4] Due to a rise in the use of criminal background checks in the tenant screening process, people with arrest and conviction records face major barriers to access housing.[5] Sometimes landlords categorically exclude people with any prior arrest or conviction—one study found 43% of Seattle landlords are inclined to reject an applicant with a criminal history.[6] One in five people who leaves prison becomes homeless soon thereafter.[7]

Inmates in King County are disproportionately racial minorities. For example, African Americans are 6.8% of the overall population of King County,[8] but account for 36.3% of the

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[1] Plaintiffs filed the parties' Stipulated Facts ("SF"). Dkt. # 24 at 2-11. For ease of reference, the City attaches pages 1 – 616 of the Stipulated Record ("SR") as the **Appendix** to this brief. ("City App." The Appendix omits only a lengthy University of Washington report on which the City does not rely.) The parties agreed their stipulation precludes neither party from: "characterizing the [SR] documents or relying on facts the documents support; citing published material, such as articles in periodicals or papers posted online; citing legislation or legislative history from other jurisdictions; asking the court to take judicial notice of adjudicative facts under FRE 201; or arguing that certain stipulated facts are immaterial to this dispute." Dkt. # 24 at 3:8-12. "If resolution of either party's summary judgment motion requires the Court to resolve a disputed issue of material fact, the Court, as the trier of fact, will resolve any disputed issue of material fact based on the record before it" Minute Order, Dkt. # 10 at 2.

[2] U.S. Dep't of Justice Office of the Attorney Gen., *The Attorney General's Report on Criminal History Background Checks* at 51 (June 2006), https://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf (accessed Oct. 26, 2018). *See also* City App. at SR 441.

[3] City App. at SR 441.

[4] City App. at SR 266.

[5] City App. at SR 450

[6] City App. at SR 226.

[7] *Id.*

[8] City App. at SR 266

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King County Jail population.[9] Native Americans are 1.1% of King County's population,[10] but account for 2.4% of the King County Jail population.[11]

In 2014, 64% of the fair housing tests conducted by the Seattle Office for Civil Rights ("SOCR") found incidents of different treatment based on race.[12] This included incidents where African Americans had to undergo criminal record checks or were asked about criminal history when similarly situated whites were not.[13]

B. The City comprehensively analyzed the problem.

In 2010 and 2011, community organizations and residents asked the City to address barriers to rental housing and employment, including the use of criminal history.[14] One result was the passage in 2013 of what is now known as the Fair Chance Employment ordinance, which restricts the use of criminal history in employment decisions.[15]

The City undertook a detailed process to address access to housing for people with criminal records. The City convened a 19-person Fair Chance Housing Committee ("FCH Committee"), which included a representative of Plaintiff Rental Housing Association of

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[9] *Id.*

[10] *Id.*

[11] *Id.* Latinos are aggregated with the white population data in the King County Jail, so rate of incarceration for Latino adults in King County is unknown.

[12] Seattle Office for Civil Rights, Press Release: *City Files Charge Against 13 Property Owners for Alleged Violations of Rental Housing Discrimination*, June 9, 2015, https://www.seattle.gov/Documents/Departments/CivilRights/socr-pr-060915.pdf (accessed Oct. 26, 2018). *See also* City App. at SR 267.

[13] *Id.*; 2017 Seattle Office for Civil Rights Testing Program Executive Summary at 6, https://www.seattle.gov/Documents/Departments/CivilRights/Testing/2017%20Testing%20Program%20Report%20FINAL.pdf (accessed Oct. 26, 2018).

[14] City App. at SR 267.

[15] Ordinance 124201, http://clerk.seattle.gov/~archives/Ordinances/Ord_124201.pdf (accessed Oct. 26, 2018). *See* Seattle Municipal Code ("SMC") 14.17.005 (indicating current title; https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.17THUSCRHIEMDE_14.17.005SHTI (accessed Oct. 26, 2018)).

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Washington ("RHA").[16] Working for a year, the FCH Committee heard from those facing barriers to housing due to their criminal records, considered academic research, and reviewed legislation from other jurisdictions that have regulated the use of criminal records in tenant screening.[17]

Based on recommendations from the FCH Committee and SOCR, the Mayor transmitted a fair chance housing bill to the City Council in June 2017.[18]

The City Council studied the issue and the bill in meetings of its Civil Rights, Utilities, Economic Development and Arts ("CRUEDA") Committee. Through public comment, staff memos, and presentations from FCH Committee members and others, the CRUEDA Committee heard individual stories of barriers to housing, heard from landlords and from Plaintiff RHA, learned of research into housing discrimination due to criminal history (and its related effect on racial discrimination), and studied how criminal records are regulated in other jurisdictions.[19]

Based on what it learned and considered, the CRUEDA Committee unanimously passed seven amendments to the Mayor's bill.[20] Recognizing that limiting landlords' use of criminal histories is one strategy to increase access to housing for people with those histories, the amended bill included such other strategies as directing SOCR to conduct regular fair housing testing and launch a "Fair Housing Home" landlord training program to reduce racial bias and

[16] City App. at SR 134-35, 230.

[17] City App. at SR 224; 276-77; *See also* Declaration of Asha Venkantaraman ¶¶ 12-13.

[18] City App. at SR 26.

[19] *See* Declaration of Asha Venkantaraman ¶¶ 14, 15, 18-24.

[20] SF ¶ 31 (Dkt. # 24 at 10); City App. at SR 547-48.

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biases against other protected classes in tenant selection.[21] The CRUEDA Committee recommended the full City Council pass the amended bill.[22]

C. The City adopted the Fair Chance Housing Ordinance to address the problem.

The City Council unanimously passed the Ordinance as recommended by the CRUEDA Committee.[23] The law, codified as Seattle Municipal Code ("SMC") Chapter 14.09, took effect September 22, 2017, but to provide time for rule-making and to adjust business practices, its operative provisions did not take effect until February 19, 2018.[24]

The Ordinance has five primary provisions. *First*, it requires landlords to notify prospective tenants that "the landlord is prohibited from requiring disclosure, asking about, rejecting an applicant, or taking an adverse action based on" the applicant's criminal history.[25] *Second*, under the Ordinance, no person may lawfully:

1. Advertise, publicize, or implement any policy or practice that automatically or categorically excludes all individuals with any arrest record, conviction, record, or criminal history from any rental housing that is located within the City.

2. **Require disclosure, inquire about, or take an adverse action against a prospective occupant, a tenant, or a member of their household, based on any arrest record, conviction record, or criminal history**, except for information pursuant to subsection 14.09.025.A.3 and subject to the exclusions and legal requirements in Section 14.09.115.[[26]]

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[21] City App. at SR 556, 593. *Accord* City App. at SR 298 (bill summary describing other initiatives to decrease bias).

[22] SF ¶ 31 (Dkt. # 24 at 10); City App. at SR 548.

[23] SF ¶¶ 31-32 (Dkt. # 24 at 10); City App. at SR 585-616).

[24] SF ¶ 33. Dkt. # 24 at 10.

[25] SMC 14.09.020. City App. at SR 598-99.

[26] Subsection 14.09.025.A.3 is the text following this paragraph. Section 14.09.115 includes exemptions for, among other things, adverse actions taken by landlords of federally assisted housing subject to federal regulations that require denial of tenancy based on certain criminal history. *See* City App. at SR 613-14.

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3. Carry out an adverse action based on registry information of a prospective adult occupant, an adult tenant, or an adult member of their household, unless the landlord has a legitimate business reason for taking such action;

4. Carry out an adverse action based on registry information regarding any prospective juvenile occupant, a juvenile tenant, or juvenile member of their household; or

5. Carry out an adverse action based on registry information regarding a prospective adult occupant, an adult tenant, or an adult member of their household if the conviction occurred when the individual was a juvenile.[27]

This brief refers to prohibition # 2 as "Subsection 2." *Third*, the Ordinance prohibits retaliation against anyone who exercises his or her rights under the Ordinance.[28] *Fourth*, the Ordinance provides for enforcement, including investigation and administrative review of charges and appeals.[29] *Finally*, the Ordinance directs the City Auditor to evaluate the Ordinance by the end of 2019 "to determine if the program should be maintained, amended, or repealed. The evaluation should include an analysis of the impact on discrimination based on race and the impact on the ability of persons with criminal records to obtain housing."[30] The Ordinance includes a standard severability provision.[31]

A. Plaintiffs challenge the Ordinance.

Plaintiffs—three landlords and RHA—initiated this action in King County Superior Court. Although Plaintiffs ask this Court to strike down the entire Ordinance, they challenge only Subsection 2.[32] They allege it facially violates landlords' rights to free speech and substantive

[27] SMC 14.09.025.A (emphasis added). City App. at SR 599.

[28] SMC 14.09.030. City App. at SR 600-01.

[29] SMC 14.09.035 – .105. City App. at SR 601-12.

[30] SMC 14.09.110. City App. at SR 612-13.

[31] SMC 14.09.120. City App. at SR 614.

[32] Pls.' Mot. for Summ. J., Dkt. # 23 at 5:19-22 (labeling Subsection 2 the "gag rule") and 25:5 (concluding the "gag rule violates free speech and due process").

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due process under the U.S. and Washington Constitutions.[33] Only RHA asserts an as-applied challenge, limited to the free speech claim.[34]

The City removed this action to this Court.[35] The parties agreed to resolve this action on cross motions for summary judgment.[36]

III. AUTHORITY

A. Subsection 2 does not run afoul of the First Amendment.

Plaintiffs' First Amendment challenge is limited to Subsection 2's prohibition on a landlord requiring disclosure of, or inquiring about, a prospective tenant's criminal history.[37] This prohibition on asking for information that may not be *used* in these commercial transactions does not implicate the First Amendment. Even if it did, Subsection 2 satisfies the intermediate scrutiny governing commercial speech regulation, and would withstand the strict scrutiny Plaintiffs mistakenly invoke.[38]

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[33] Compl. for Decl. & Inj. Relief, Dkt. # 1-1 at 14-18.

[34] SF ¶ 18 n.2. Dkt. # 24 at 8 n.2.

[35] Compl. for Decl. & Inj. Relief, Dkt. # 1.

[36] Minute Order, Dkt. # 10.

[37] Pls.' Mot. for Summ. J., Dkt. # 23 at 9:23-24 ("The Fair Chance Housing Ordinance burdens speech by restricting access to public information"); *id.* at 6:3-4 ("Seattle's gag rule violates the First Amendment by prohibiting a specific group from inquiring about, accessing, and sharing otherwise publicly available information."); *see also* Compl. for Decl. & Inj. Relief, Dkt. # 1-1 at 13:5-6 ("The Fair Chance Housing Ordinance violates the Free Speech guarantees … because it bars access to truthful information"). Plaintiffs do not challenge on First Amendment grounds Subsection 2's prohibition on taking "an adverse action" against a prospective occupant or current tenant on the basis of criminal history—a regulation of conduct, not speech. *See, e.g.*, *Chamber of Commerce for Greater Phila. v. City of Phila.*, 319 F. Supp. 3d 773, 803-04 (E.D. Pa. 2018), *appeal filed* (3rd Cir. May 30, 2018).

[38] Because the Washington and U.S. Constitutions offer commercial speech the same protection, Washington courts apply the federal analysis to Washington commercial free speech claims. *Bradburn v. N. Cent. Reg'l Library Dist.*, 168 Wn.2d 789, 800, 231 P.3d 166 (2010). Like Plaintiffs, the City relies on federal authority. *See* Pls.' Mot. for Summ. J., Dkt. # 23 at 9 n.2.

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1. The prohibitions on disclosure of and inquiry about criminal history do not implicate the First Amendment.

Subsection 2 is a regulation of commercial conduct with only incidental impacts on speech. It does not implicate the First Amendment. "[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct . . . . [T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech."[39] Regulating conduct does not abridge freedom of speech "merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[40] First Amendment protection extends only to conduct that is inherently expressive.[41]

The threshold question is whether the desire to stifle speech motivated the regulation of "conduct with a 'significant expressive element'" or "the ordinance has the inevitable effect of 'singling out those engaged in expressive activity.'"[42] Because Subsection 2 does not single out those engaged in expressive activity, such as newspapers or advocacy organizations, this case turns on the "significant expressive element" standard. Applying it, the Ninth Circuit rejected a First Amendment challenge to Seattle's minimum wage ordinance because the regulated conduct lacked a significant expressive element:

> Seattle's minimum wage ordinance is plainly an economic regulation that does not target speech or expressive conduct. The conduct at issue—the decision of a

[39] *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011).

[40] *Expressions Hair Design v. Schneiderman*, __ U.S. __, 137 S. Ct. 1144, 1151 (2017) (quotation marks & citation omitted).

[41] *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006); *accord Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 895 (9th Cir. 2018) (the conduct must be inherently expressive to merit constitutional protection) (quotation marks & citation omitted); *Carter v. Inslee*, No. C16-0809-JCC, 2016 WL 8738675, *8 (W.D. Wash. Aug. 25, 2016) ("Speech may be implicated in the regulation of conduct, and First Amendment protection does not apply to conduct that is not inherently expressive.").

[42] *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015) (quoting *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-06 (1986)), *cert. denied*, 136 U.S. 1838 (2016).

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> franchisor and a franchisee to form a business relationship and their resulting business activities—exhibits nothing that even the most vivid imagination might deem uniquely expressive. **A business agreement or business dealings between a franchisor and a franchisee is not conduct with a significant expressive element**. Nor does the statute single out those engaged in expressive activity such as newspapers or advocacy organizations.
>
> The ordinance, like a statute barring anti-competitive collusion, is not wholly unrelated to a communicative component, but that in itself does not trigger First Amendment scrutiny. Although the franchisees are identified in part as companies associated with a trademark or brand, the ordinance applies to businesses that have adopted a particular business model, not to any message the businesses express. It is clear that **the ordinance was not motivated by a desire to suppress speech, the conduct at issue is not franchisee expression**, and the ordinance does not have the effect of targeting expressive activity.[43]

Subsection 2 prohibits the *use* of criminal history in selecting tenants, unchallenged by Plaintiffs under the First Amendment. To prevent that unlawful use of criminal history, the Ordinance prohibits landlords from requiring prospective tenants to hand over their criminal history to landlords in the first place—conduct that is not inherently expressive. As Plaintiffs explain, they simply seek access to the criminal history.[44] Like Seattle's minimum wage ordinance, Subsection 2 is an economic regulation that does not target speech or expressive conduct and was not motivated by a desire to suppress speech. Subsection 2 "does not regulate conduct that communicates a message or that has an expressive element."[45]

Subsection 2 is also like a statute requiring law schools—despite their opposition to the military's treatment of gay and lesbian service members—to permit military recruiters access to students, send scheduling e-mails, and otherwise advertise for military recruiters. The Supreme Court upheld that law, finding it regulated conduct, not speech.[46] The Court analogized the statute to one prohibiting discrimination: the government "can prohibit employers from

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[43] *Id.* at 408-09 (quotation marks, brackets & citations omitted; emphasis added).

[44] Pls.' Mot. for Summ. J., Dkt. # 23 at 12:8-10.

[45] *Rumsfeld*, 547 U.S. at 66.

[46] *Id.* at 62.

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discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct."[47]

Subsection 2 regulates business dealings between landlords and prospective tenants and prohibits landlords from asking for criminal history information, which they are prohibited from using. It is an economic regulation that does not target speech. The Ordinance implicates no landlord speech regarding their views on anything, let alone speech "with a significant expressive element."[48] Like a judicial candidate solicitation restriction the Supreme Court upheld under strict scrutiny, Subsection 2 leaves landlords "free to discuss any issue with any person at any time," they just cannot solicit information on one topic: criminal history.[49]

The Ordinance regulates commercial conduct. Because it does not implicate the First Amendment, Plaintiffs' challenge fails.

2. If Subsection 2 implicates the First Amendment, it is subject only to the intermediate scrutiny of commercial speech regulations.

If Subsection 2 implicates the First Amendment, it is a valid regulation of commercial speech. "The government's legitimate interest in protecting consumers from commercial harms explains why commercial speech can be subject to greater governmental regulation than

[47] *Id.*

[48] *Airbnb, Inc. v. City & Cnty. of San Francisco*, 217 F. Supp. 3d 1066, 1076 (N.D. Cal. 2016) (booking with Airbnb "is a business transaction to secure a rental, not conduct with a significant expressive element").

[49] *Williams-Yulee v. Florida Bar*, __ U.S. __, 135 S. Ct. 1656, 1670 (2015).

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noncommercial speech."[50] Rental housing is an area traditionally subject to government regulation to protect consumers[51] who are not on equal footing with landlords.

Regulating speech that solicits a commercial transaction or is involved with consummating a commercial transaction is tested under intermediate scrutiny, even if the regulation is content-based.[52] Even noncommercial speech that includes political speech will be judged by this standard where it is communicated as part of a commercial transaction.[53]

Context matters when assessing what speech falls within the ambit of intermediate scrutiny. For example, when considering a challenge to a federal regulation prohibiting the discussion of race in applications for federal housing, the Sixth Circuit recognized a "somewhat larger category of commercial speech that does not, strictly speaking, propose a commercial transaction, but is nonetheless linked inextricably to an underlying commercial transaction." [54] At issue were discriminatory statements made by a landlord to an inspector whose approval was a precondition to a pending lease. The court ruled the commercial speech standard applied to the landlord's challenge of the regulation, even though the landlord and inspector proposed no commercial transaction.[55] The court reasoned "it is the government's power to regulate commercial transactions that justifies its concomitant power to regulate speech that is 'linked

[50] *Sorrell*, 564 U.S. at 579 (quotation marks & citations omitted); *accord 44 Liquormart, Inc v. Rhode Island*, 517 U.S. 484, 499 (1996) (commercial speech receives less Constitutional protection because it occurs in an area traditionally subject to government regulation).

[51] *See Campbell v. Robb*, 162 Fed. Appx. 460, 471-72 (6th Cir. 2006).

[52] *Valle del Sol, Inc. v. Whiting*, 709 F.3d 808, 818 (9th Cir. 2013); *Sorrell*, 564 U.S. at 579 ("It is true that content-based restrictions on protected expression are sometimes permissible, and that principle applies to commercial speech.") (quotation marks & citation omitted).

[53] *See, e.g., Valle del Sol*, 709 F.3d at 819 (applying intermediate scrutiny to a ban on soliciting work as a day laborer, even though the solicitation might communicate a political message, because "the primary purpose of the communication is to advertise a laborer's availability for work and to negotiate the terms of such work").

[54] *Campbell*, 162 Fed. Appx. at 471 (quotation marks & citation omitted).

[55] *Id.* at 471-72.

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inextricably' to those transactions"[56] and recognized that the "commonsense difference between commercial and non-commercial speech is one of context."[57] That reasoning is consistent with a recent decision by a District Court to apply intermediate scrutiny to an ordinance prohibiting employers from asking potential hires about their previous wage history because the inquiry occurs in a commercial transaction: a job application.[58]

If Subsection 2 implicates the First Amendment, it is subject to intermediate scrutiny because any regulated speech occurs within the context of, and is inextricably linked to, commercial transactions between landlords and tenants. The "protected speech" of Plaintiff RHA consists of "background reports" for use by landlords in commercial transactions.[59] Although Plaintiffs' core First Amendment rights could be implicated if the City regulated their discussion of criminal history in other settings, their *use* of (and demand for) criminal history in selecting tenants concerns a commercial transaction, which the City may regulate subject only to intermediate scrutiny.

Plaintiffs contend Subsection 2 resembles the pharmaceutical marketing law in *Sorrell*, which they claim "was subject to strict scrutiny."[60] Subsection 2, they say, "is not a commercial speech restriction subject to intermediate scrutiny" and "must therefore satisfy strict scrutiny."[61] But *Sorrell* applied "heightened," not strict, scrutiny and the Ninth Circuit ruled *en banc* that

[56] *Id.* at 469 (quoting *44 Liquormart*, 517 U.S. at 499).

[57] *Id.* at 471 (quotation marks & citation omitted; emphasis added).

[58] *Chamber of Commerce*, 319 F. Supp. 3d at 781 (emphasis added).

[59] Pls.' Mot. for Summ. J., Dkt. # 23 at 12:22-23.

[60] *Id.* at 12:26 – 13:13.

[61] *Id.* at 13:18-19.

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Sorrell applied nothing more than the intermediate scrutiny standard long governing commercial speech regulations.[62]

3. Subsection 2 satisfies intermediate scrutiny.

Central Hudson provides the intermediate scrutiny test for commercial speech restrictions:

> For commercial speech to come within [the First Amendment], [1] it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.[63]

Subsection 2 satisfies this test.

a. The request for criminal history concerns unlawful activity.

Because regulating unlawful activity does not warrant First Amendment scrutiny, a District Court in the Ninth Circuit recently rejected a commercial speech challenge to a regulation that prohibited hosting platforms from completing and booking temporary home rentals that were not properly registered with the local jurisdiction: "Plaintiffs cannot use the First Amendment as a shield to allow them to communicate offers to rent illegal units."[64] Another District Court in the Ninth Circuit likewise ruled a rental home hosting platform could not seek "to set aside on First Amendment grounds an ordinance that they contend would restrict their ability to communicate offers to rent [unlawful,] unregistered units."[65]

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[62] *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 841 (9th Cir. 2017) (*en banc*).

[63] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

[64] *Homeaway.com, Inc. v. City of Santa Monica*, No. 2:16-cv-06641-ODW (AFM), 2018 WL 3013245 (C.D. Cal. June 14, 2018), *appeal filed* (9th Cir. June 19, 2018).

[65] *Airbnb*, 217 F. Supp. 3d at 1079.

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Because Subsection 2 regulates *unlawful* activity by prohibiting landlords from inquiring about or forcing tenants to hand over criminal history, the *Central Hudson* inquiry ends. Subsection 2 satisfies the First Amendment.

Even if this Court were to apply the remaining prongs of the *Central Hudson* test, they would yield the same conclusion.

b. The City's interest is substantial.

Subsection 2 satisfies the second prong of *Central Hudson*. Plaintiffs assume the Ordinance "furthers a compelling interest"[66] necessary to satisfy strict scrutiny. Indeed, stopping discrimination a compelling interest.[67] The purpose of Subsection 2—and the Ordinance—is to reduce barriers to housing faced by people with criminal records and to lessen the use of criminal history as a proxy to discriminate against people of color disproportionately represented in the criminal justice system.[68]

c. The Ordinance directly advances the City's interest.

Under the third prong of *Central Hudson*, the Ordinance satisfies the First Amendment if it is supported by more than "mere speculation or conjecture" and "the harms it recites are real and . . . its restriction will in fact alleviate them to a material degree."[69] But the government need not produce empirical data to substantiate the need for a commercial speech restriction; it may

[66] Pls.' Mot. for Summ. J., Dkt. # 23 at 14:4-5.

[67] Combating age discrimination is a "compelling" interest under the more searching strict scrutiny test applied to core First Amendment speech. *IMDB.com, Inc. v. Becerra*, No. 16-cv-06535-VC, 2018 WL 979031, *2 (N.D. Cal. Feb. 20, 2018), *appeal filed* (9th Cir. Mar. 23, 2018).

[68] *See supra* Part II.

[69] *Edenfield v. Faine*, 507 U.S. 761, 770-71 (1993).

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rely on history, consensus, and common sense.[70] "It is well established that a law need not deal perfectly and fully with an identified problem to survive intermediate scrutiny."[71] As Plaintiffs correctly note, the First Amendment "does not require a law to 'address all aspects of a problem in one fell swoop.'"[72] A regulation satisfies this standard if it has exceptions for "narrow and well-justified circumstances."[73] Where exceptions to a regulation "have a minimal effect on the overall scheme," a regulation is not unduly underinclusive.[74] A court should find no constitutional infirmity in government's decision not to exhaust the full breadth of its authority by regulating every instance of a certain harm.[75]

Subsection 2 and the Ordinance satisfy this test. Studies demonstrate criminal histories pose the largest barrier to those seeking housing[76] and have a disparate impact on communities of color.[77] Reducing landlords' ability to screen applicants' criminal histories reduces landlords' ability to commit the unlawful act of denying tenancy based on criminal history.

Plaintiffs wrongly suggest the Court should disregard the effectiveness of Subsection 2 and the rest of the Ordinance because of its narrow, well-justified, and required exemption for providers of federally-assisted housing. The City cannot overrule federal law. The exemption for those providers is limited to their decisions to deny tenancy (or take other "adverse actions")

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[70] *Tracy Rifle & Pistol LLC v. Harris*, ___ F. Supp. 3d ___, No. 2:14-cv-02626-TLN-DB, 2018 WL 4362089, *3 (E.D. Cal. Sept. 11, 2018); accord *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995); *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

[71] *Contest Promotions, LLC v. City & County of San Francisco*, 874 F.3d 597, 604 (9th Cir. 2017).

[72] Pls.' Mot. for Summ. J., Dkt. # 23 at 14:16-17 (quoting *Williams-Yulee*, 135 S. Ct. at 1670).

[73] *Sorrell*, 564 U.S. at 573.

[74] *Retail Digital Network*, 861 F.3d at 850.

[75] *See Contest Promotions*, 874 F.3d at 604.

[76] City App. at SR 272-274.

[77] *Id*.

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where federal regulations require that decision because of certain convictions.[78] The exemption has a minimal effect on the Ordinance's overall scheme because those providers—like other Seattle landlords—remain subject to the Ordinance's other requirements.[79]

The Ordinance directly advances the City's interest. The federal housing provider exception, required by federal law, is narrow and well-justified. It has a minimal effect on the Ordinance's overall scheme, and does not render the Ordinance unduly underinclusive.

d. The Ordinance is not more extensive than necessary.

The final prong of *Central Hudson* requires "a reasonable fit between the government's legitimate interests and the means it uses to serve those interests."[80] "Government's fit need not be the least restrictive means, and it need not be perfect, but it must be reasonable."[81] Subsection 2 and the Ordinance satisfy this requirement.

Plaintiffs offer several alternatives they say the City could have employed. None of those alternatives, even if effective, would have made Subsection 2 an unreasonable legislative choice. But none of Plaintiffs' seven alternatives is effective.

First, they suggest a change to "Washington tort law."[82] The City cannot change state law.

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[78] SMC 14.09.115.B. City App. at SR 613.

[79] The exception is only for "adverse actions." SMC 14.09.115.B. City App. at SR 613. These providers remain liable for, among other things, other unfair practices and prohibited retaliation. *See* SMC 14.09.025.A and 030. City App. at SR 599-601.

[80] *Valle del Sol*, 709 F.3d at 825 (quotation marks & citations omitted).

[81] *Tracy Rifle*, 2018 WL 4362089 at *7 (citing *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999)); *accord Retail Digital Network*, 861 F.3d at 846.

[82] Pls.' Mot. for Summ. J., Dkt. # 23 at 18:24-25.

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Second, Plaintiffs contend the City could have adopted a certification programs requiring a probation officer's approval to access housing.[83] The City's Reentry Workgroup has considered and rejected the effectiveness of the Certificate of Restoration of Opportunity ("CROP") under RCW 9.97.020:

> [T]he Workgroup does not believe that CROP provides a real and equitable pathway to economic opportunity. In order access CROP, individuals must be in compliance with or have completed all sentencing requirements imposed by a court including paying off their legal debt. For most individuals leaving prison, this may never be possible. Whether someone should have access to an occupational license should not be determined by their financial ability, especially when their income and economic opportunities were limited by incarceration.[84]

During a radio interview, FCH Committee member Augustine Cita responded to Plaintiff RHA Board president Sean Flynn's proposal that the City adopt a CROP program: "The process it would take to get [certification] are barriers within themselves."[85]

Third, Plaintiffs suggest the City can indemnify or insure landlords to cover liability the landlord may face from "renting to someone with a criminal history."[86] The City need not indemnify or insure because no Washington appellate decision finds a landlord liable for a tenant's criminal activity due to the landlord's failure to screen. To the extent a landlord may be held liable for something foreseeable, the Ordinance eliminates foreseeability by prohibiting review of a potential tenant's criminal history.

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[83] *Id.* at 18:26 – 19:7.

[84] Seattle Reentry Workgroup, *Seattle Reentry Workgroup Final Report* (October, 2018), https://www.seattle.gov/Documents/Departments/CivilRights/ReentryReport.pdf at 31(accessed Oct. 26, 2018). *See* Ordinance § 1.A.4, City App. at SR 593 (directing what it calls the "Re-Entry Taskforce" to "explore additional mechanisms to reduce the greatest barriers to housing for individuals with criminal conviction records").

[85] KUOW, *Debate: Do landlords unfairly discriminate against those with criminal records?* at 10:12 (June 22, 2017), http://archive.kuow.org/post/debate-do-landlords-unfairly-discriminate-against-those-criminal-records.

[86] Pls.' Mot. for Summ. J., Dkt. # 23 at 19:8-12.

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Fourth, Plaintiffs claim the City could "expand supportive public housing options."[87] Plaintiffs do not suggest the City provides no supporting housing options—they just say the City must add more without offering a limit. Of course, Plaintiffs do not suggest the City has the financial resources to provide public housing to each Seattle resident with a criminal history or that the City may not enact the Ordinance's substantial measures if the City lacks the means to pay for public housing for all.

Fifth, Plaintiffs argue the City could have "opted for a less-restrictive background check regulation."[88] The City considered and rejected this approach as ineffective. Without a business justification, any criminal conviction screening can be a tool for racial discrimination[89] because it disproportionately affects people of color.[90]The high error rates in criminal record databases[91] make any resort to them problematic.

Sixth, Plaintiffs maintain the City could have "expanded exceptions."[92] That landlords would prefer more exceptions to fewer is neither surprising nor germane. Plaintiffs criticize the Ordinance's exceptions for leasing or subleasing a single-family or accessory dwelling unit where the landlord or subleasing tenant lives in the same single-family unit or on the same lot as the accessory unit. Citing "safety concerns," they argue "it is arbitrary to allow subleasing tenants to check criminal background but not to allow an exception for roommates who all lease

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[87] *Id.* at 19:13-18.

[88] Pls.' Mot. for Summ. J., Dkt. # 23 at 19:19-16:4.

[89] City App. at SR 226.

[90] Rebecca Oyama, *Do not (Re)enter: The Rise of Criminal Background Tenant Screening As a Violation of the Fair Housing Act*, 15 Mich. J. Race & L. 181, 220 (2009).

[91] City App. at SR 120.

[92] Pls.' Mot. for Summ. J., Dkt. # 23 at 20:5-17.

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directly from the landlord."[93] Plaintiffs offer nothing in the record substantiating safety concerns or suggesting those exceptions were motivated by safety. People banding together as prospective roommates to approach a landlord for tenancy need no exception because they are not subject to the Ordinance—they lack the legal capacity to lease property or make any other tenancy decision the Ordinance regulates as an "adverse action."[94]

Finally, Plaintiffs argue incorrectly that existing federal guidance suffices.[95] The guidance is not binding. The guidance has proven insufficient, given data showing individuals continue to experience obstacles in securing housing because of their criminal history.[96] The guidance places a significant burden on the applicant or tenant to demonstrate discrimination following analysis of a landlord's subjective determination to deny tenancy.[97]

The Ordinance is a reasonable means of accomplishing the City's legitimate interests. To satisfy *Central Hudson*, it need not be the least restrictive or perfect.

4. Subsection 2 satisfies strict scrutiny.

For strict scrutiny to apply, as Plaintiffs suggest, Subsection 2 would need to target core First Amendment speech.[98] It does not. But even if the Ordinance were subject to strict scrutiny,

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[93] *Id.* at 16:8-12 (citing SMC 14.09.115.C and .D, *see* City App. at SR 613-14).

[94] SMC 14.09.010. City App. at SR 593-94.

[95] Pls.' Mot. for Summ. J., Dkt. # 23 at 20:18 – 21:2.

[96] *See* Ordinance recitals. City App. at SR 588-592.

[97] U.S. Department of Housing and Urban Development, *Office of General Counsel on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* at 3 (April 4, 2016) https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF (accessed Oct. 26, 2018) (a plaintiff "must prove that the criminal history policy has a discriminatory effect . . . satisfied by presenting evidence proving that the challenged practice actually or predictably results in disparate impact[,]" including "national or local statistical evidence").

[98] The cases on which Plaintiffs rely do not reference, let alone concern, commercial speech. *See* Pls.' Mot. for Summ. J., Dkt. # 23.

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Subsection 2 and the Ordinance pass muster. Combatting discrimination is a compelling interest.[99] Plaintiffs do not disagree.[100]

But relying on *Williams-Yulee*,[101] Plaintiffs claim Subsection 2 is not narrowly tailored to achieve that compelling interest because it is underinclusive.[102] *Williams-Yulee* explained underinclusivity does not prove a free speech violation:

> Although a law's underinclusivity raises a red flag, the First Amendment imposes no freestanding underinclusiveness limitation. A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service to their stated interests.[103]

Applying strict scrutiny and finding "no fatal underinclusivity concerns," the Court upheld a prohibition on solicitations from judicial candidates, even though the prohibition was designed to maintain judicial integrity and did not restrict other speech that undermined judicial integrity.[104] The Court held the First Amendment "does not put a State to that all-or-nothing choice"—it requires a law to be "narrowly tailored, not that it be perfectly tailored."[105] The court refused to punish the State "for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pretextual motive."[106]

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[99] *IMDB.com*, 2018 WL 979031 at *2.

[100] Pls.' Mot. for Summ. J., Dkt. # 23 at 14:4-5.

[101] 135 S. Ct. at 1668.

[102] Pls.' Mot. for Summ. J., Dkt. # 23 at 14-17.

[103] *Williams-Yulee*, 135 S. Ct. at 1668 (quotation marks & citation omitted).

[104] *Id.*

[105] *Id.* at 1670-71 (quotation marks & citation omitted).

[106] *Id.* at 1670.

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Subsection 2 raises no fatal underinclusivity concerns and reflects no pretextual motive to silence landlords' speech.[107] The Ordinance's exceptions have no connection to silencing speech—the Ordinance applies evenhandedly to all landlords who are not governed by federal law, regardless of their viewpoint.

Plaintiffs also contend that the Ordinance is not the least restrictive means to achieve the City's interest. Because Plaintiffs' proposed alternatives will not be as effective as Subsection 2 (or effective at all),[108] this contention also fails.[109]

Although strict scrutiny is not the proper standard to apply to Subsection 2's regulation of a commercial transaction, Subsection 2 withstands strict scrutiny. The Ordinance's prohibition of requesting criminal background information in a transaction in which such information may not be used infringes no First Amendment right and should be upheld.

B. Plaintiffs fail to carry their burden of proving Subsection 2 facially violates landlords' substantive due process rights.

Plaintiffs face a significant burden to prove their facial due process claims. Out of deference to the legislative process, courts presume a law is constitutional unless the challenger clearly proves it unconstitutional.[110] A facial constitutional challenge poses an additional

[107] *See supra* Part III.A.3.c.

[108] *See supra* Part III.A.3.d.

[109] *See Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665 (2004).

[110] *United States v. Xiaoying Tang Dowai*, 839 F.3d 877 (9th Cir. 2016), cert. denied, 138 S. Ct. 58, 199 L. Ed. 2d 44 (2017), (plaintiff has the "considerable burden of making a plain showing that [the legislature] exceeded its constitutional bounds"); *Island Cnty. v. State*, 135 Wn.2d 141, 146–47, 955 P.2d 377 (1998) ("the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt").

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obstacle because a court must reject the claim if any circumstances exist where the challenged law can be applied constitutionally.[111] Plaintiffs cannot meet their burden of proof.

1. Federal courts apply the "rational basis" analysis, not "substantially advances."

The "rational basis" analysis is the "most relaxed form of judicial scrutiny."[112] It arose under federal due process law in the 1920s in *Euclid* and *Nectow*, which articulated the touchstone of "clearly arbitrary and unreasonable, having no substantial relation" to the public welfare.[113] Federal courts have consistently applied that touchstone through today.[114] It stems from the long-held belief that, unless a plaintiff can show a law lacks a rational foundation, "the people must resort to the polls not the courts."[115] A court must presume a law is valid unless a plaintiff meets the exceedingly high burden of proving it advances no governmental purpose.[116]

Plaintiffs cite "rational basis" authority, but mislabel it "substantially advances,"[117] which was a less deferential analysis never part of federal due process law. Under "substantially advances," a challenged law must be more than rational; it must also be effective in achieving a "legitimate" public purpose.[118] "Substantially advances" was an error limited to, and ultimately

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[111] *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000); *accord Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50 (2008) (plaintiff must establish that no set of circumstances exists under which the law would be valid).

[112] *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 223, 143 P.3d 571 (2006).

[113] *Nectow v. City of Cambridge*, 277 U.S. 183, 187–88 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

[114] *E.g.*, *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540–42 (2005); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955); *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938); *Yagman v. Garcetti*, 852 F.3d 859, 867 (9th Cir. 2017).

[115] *Williamson*, 348 U.S. at 488 (quoting *Munn v. State of Illinois*, 94 U.S. 113, 134 (1876)).

[116] *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012); *North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008).

[117] Pls.' Mot. for Summ. J., Dkt. # 23 at 21:11-12, 24:10-15.

[118] *Lingle*, 544 U.S. at 542. *See Nollan v. California. Coastal Comm'n*, 483 U.S. 825, 835 n.3 (1987) (distinguishing "substantially advances" from "rational basis").

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ejected from, takings law. It emerged in *Agins*, a 1980 takings decision that mistook *Nectow* as holding a law effects a taking if it "does not substantially advance legitimate state interests."[119] In 2005, *Lingle* admitted the error and removed "substantially advances" from takings law.[120] Although *Lingle* observed that *Agins* derived "substantially advances" from *Nectow*, a due process case, *Lingle* lamented that "the language [*Agins*] selected was regrettably imprecise" for placing courts in the hazardous role of weighing testimony about a law's efficacy.[121] Such judicial proceedings would be "remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation."[122] Nodding to "rational basis," *Lingle* buried "substantially advances" with a terse eulogy: "The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established . . . ."[123]

2. The Washington Supreme Court applies the "rational basis" analysis, not "undue oppression."

Despite a two-decade misadventure with the *Lochner*-era "undue oppression" analysis, the Washington Supreme Court, like the U.S. Supreme Court, applies the "rational basis" analysis to substantive due process claims.

Through the 1970s, the Washington Supreme Court used the "rational basis" analysis and rejected "undue oppression" for substantive due process claims. In 1976, *Salstrom's Vehicles* dismissed a due process challenge by reciting a U.S. Supreme Court "rational basis" axiom: "It is

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[119] *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). *Nectow* involved no takings claim and said nothing about advancing a governmental interest. *See Nectow*, 277 U.S. 183.

[120] *Lingle*, 544 U.S. at 542–45. *Accord Guggenheim v. City of Goleta*, 638 F.3d 1111, 1117 (9th Cir. 2010) ("*Agins* was overruled by *Lingle*").

[121] *Id.* at 540, 542, and 544–55.

[122] *Id*. at 545.

[123] *Id*.

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enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[124] *Salstrom's Vehicles* rejected "undue oppression": "That a statute is unduly oppressive is not a ground to overturn it under the due process clause."[125]

But in the 1980s—without mentioning "rational basis" or recognizing the shift—the Washington Supreme Court mistakenly recited "undue oppression" as the federal analysis,[126] extoling it for lodging wide discretion in courts, not the legislature, to balance public and individual interests.[127] The Court relied on *Lawton v. Steele*, an 1894 U.S. Supreme Court decision premised on the *Lochner*-era notion that courts must "supervise" the legislature to cull "unusual and unnecessary restrictions upon lawful occupation."[128]

This detour into "undue oppression" was not, as Plaintiffs suggest, an expression of a unique Washington constitutional provision—it was a misstatement of the federal analysis.[129] The due process clauses of the Washington and U.S. Constitutions are identical.[130] The Washington Supreme Court "has repeatedly iterated that the state due process clause is

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[124] *Salstrom's Vehicles v. Department of Motor Vehicles*, 87 Wn.2d 686, 693, 555 P.2d 1361 (1976) (quoting *Williamson*, 348 U.S. at 487–88).

[125] *Id*.

[126] *E.g.*, *Orion Corp. v. State*, 109 Wn.2d 621, 647–48, 747 P.2d 1062 (1987); *Cougar Business Owners Ass'n v. State*, 97 Wn.2d 466, 477, 647 P.2d 481 (1982).

[127] *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 331, 787 P.2d 907 (1990).

[128] *Lawton v. Steele*, 152 U.S. 133, 137 (1894). *See Presbytery*, 114 Wn.2d at 330 (citing *Lawton*); *Cougar Business*, 97 Wn.2d at 477 ("The classic statement of the rule in *Lawton* . . . is still valid today.") *See* also *Amunrud*, 158 Wn.2d at 227–29 (discussing the rise, fall, and perils of the *Lochner* era).

[129] *Cf.* Pls.' Mot. for Summ. J., Dkt. # 23 at 21:10-11.

[130] Wash. Const. art. I, §3 ("No person shall be deprived of life, liberty, or property, without due process of law."); U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); U.S. Const. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

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coextensive with and does not provide greater protection than the federal due process clause."[131] But Washington nevertheless embraced "undue oppression" through case law assessing claims—often takings, not due process—under only the U.S. Constitution, or under the U.S. and Washington Constitutions.[132] For the next 15 years, still believing it was using the federal analysis, the Washington Supreme Court applied "undue oppression" to claims under the U.S. Constitution and where the Court identified no constitutional source.[133]

In 2006, the Washington Supreme Court corrected course in *Amunrud* by again recognizing "rational basis" as the correct analysis and rejecting a dissenting Justice's use of "undue oppression" for a claim under both constitutions.[134] *Amunrud* ruled that imposing an "undue oppression" analysis "would require us to overturn nearly 100 years of case law in Washington" and return Washington law to the long-rejected *Lochner* era "in which elected legislatures were viewed as having limited power (police power) to enact laws providing for health, safety, and welfare of their citizens."[135] Stressing the need for deference, *Amunrud*

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[131] *Nielsen v. Washington State Department of Licensing*, 177 Wn. App. 45, 52 n.5, 309 P.3d 1221 (2013). *Accord Rozner v. City of Bellevue*, 116 Wn.2d 342, 351, 804 P.2d 24 (1991) ("This court traditionally has practiced great restraint in expanding state due process beyond federal perimeters."); *State v. Shelton*, 194 Wn. App. 660, 666, 378 P.3d 230 (2016), *rev. denied*, 87 Wn.2d 1002, 386 P.3d 1088 (2017) ("In analyzing a substantive due process challenge, our Supreme Court has held the Washington due process clause does not afford broader protection than the Fourteenth Amendment.").

[132] *See id.* at 326–28, 330–31 (takings; both constitutions); *Orion*, 109 Wn.2d at 624–26, 646–49 (takings; both); *Valley View Industrial Park v. City of Redmond*, 107 Wn.2d 621, 636, 733 P.2d 182 (1987) (due process; no source specified); *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 52, 720 P.2d 782 (1986) (due process; federal only); *Cougar Business*, 97 Wn.2d at 476–77 (takings; both).

[133] *See, e.g.*, *Viking Properties*, 155 Wn.2d 112, 117–18, 118 P.3d 322 (2005) (unspecified); *Willoughby v. Department of Labor & Industries*, 147 Wn.2d 725, 732–34, 57 P.3d 611 (2002) (unspecified); *Asarco Inc. v. Department of Ecology*, 145 Wn.2d 750, 761–63, 43 P.3d 471 (2002) (federal); *Weden v. San Juan County*, 135 Wn.2d 678, 706–07, 958 P.2d 273 (1998) (unspecified); *Christianson v. Snohomish Health Dist.*, 133 Wn.2d 647, 661–67, 946 P.2d 768 (1997) (unspecified); *Robinson v. City of Seattle*, 119 Wn.2d 34, 48, 51–52, 830 P.2d 318 (1992) (federal); *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 6, 20–22, 829 P.2d 765 (1992) (federal).

[134] *Amunrud*, 158 Wn.2d at 226. *See id.* at 211 (explaining the claim was under both constitutions).

[135] *Id.* at 227–28 (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

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warned: "A return to the *Lochner* era would . . . strip individuals of the many rights and protections that have been achieved through the political process."[136] Since *Amunrud*, the Washington Supreme Court has applied only the "rational basis" analysis to substantive due process claims.[137]

Unfortunately, while embracing "rational basis" and rejecting "undue oppression," *Amunrud* did not overrule Washington's "undue oppression" case law, which continues to sow confusion. Since *Amunrud*, some Washington Court of Appeals decisions used "rational basis,"[138] but others recited "undue oppression."[139] Noting "confusion over the proper test to apply," one decision ducked the question by ruling the claim failed under both analyses.[140] While applying "rational basis" to federal due process claims,[141] the Ninth Circuit invoked "undue oppression" when attempting to apply what it assumed incorrectly was Washington-specific due process principles to a claim under the Washington Constitution.[142]

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[136] *Id*. at 230.

[137] *See, e.g.*, *Dot Foods, Inc. v. State, Dept. of Revenue*, 185 Wn.2d 239, 372 P.3d 747 (2016), *as amended on denial of reconsideration* (Apr. 28, 2016), *cert. denied sub nom. Dot Foods, Inc. v. Dep't of Revenue of State of Washington*, 137 S. Ct. 2156, 198 L. Ed. 2d 231 (2017); *In re Detention of Morgan*, 180 Wn.2d 312, 324, 330 P.3d 774 (2014). Without having to address the merits of the "undue oppression" analysis, the Court later rejected a stand-alone, "undue oppression" argument by factually distinguishing an earlier "undue oppression" decision. *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 254–60, 218 P.3d 180 (2009).

[138] *See, e.g.*, *Haines-Marchel v. Wash. State Liquor & Cannabis Bd.*, 1 Wn. App. 2d. 712, 406 P.3d 1199 (2017), *review denied*, 191 Wn.2d 1001, 422 P.3d 913 (2018); *Olympic Stewardship Found. v. State*, 199 Wn. App. 668, 720–21, 399 P.3d 562 (2017), *rev. denied*, 189 Wn.2d 1040, 409 P.3d 1066 (2018), *petition for cert. filed* (U.S. May 4, 2018); *Jespersen v. Clark Cnty.*, 199 Wn. App. 568, 584–85, 399 P.3d 1209 (2017); *Shelton*, 194 Wn. App. at 666–67; *Nielsen*, 177 Wn. App. at 53; *Johnson v. Wash. State Dep't of Fish & Wildlife*, 175 Wn. App. 765, 775–78, 305 P.3d 1130 (2013); *In re J.R.*, 156 Wn. App. 9, 18–19, 230 P.3d 1087 (2010).

[139] *E.g.*, *Klineburger v. Wash. St. Dept. of Ecology*, __ Wn. App. __, 2018 WL 3853574, *4–*5 (2018, unpublished); *Fox v. Skagit Cnty.*, 193 Wn. App. 254, 278–79, 372 P.3d 784 (2016); *Greenhalgh v. Dep't of Corrections*, 180 Wn. App. 876, 892, 324 P.3d 771 (2014); *Cradduck v. Yakima Cnty.*, 166 Wn. App. 435, 446–451, 271 P.3d 289 (2012); *Bayfield Resources Co. v. W. Wash. Growth Mgmt. Hearings Bd.*, 158 Wn. App. 866, 881–888, 244 P.3d 412 (2010).

[140] *Cannatonics v. City of Tacoma*, 190 Wn. App. 1005, 2015 WL 5350873 *4 n.7 (2015, unpublished).

[141] *E.g.*, *Samson*, 683 P.3d at 1058; *North Pacifica*, 526 F.3d at 484.

[142] *Laurel Park Cmty, LLC v. City of Tumwater*, 698 F.3d 1180, 1193–95 (9th Cir. 2012).

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The Washington Supreme Court now has an opportunity to clarify Washington's due process law. In a separate case challenging a different City ordinance brought by the same attorneys on behalf of most of the Plaintiffs in this action, the City has asked the Washington Supreme Court to reaffirm "rational basis" is the correct analysis and overrule its "undue oppression" case law.[143] And after completing briefing on the cross motions in this action, the City may ask this Court to certify to the Washington Supreme Court the question of which analysis applies to substantive due process claims under the Washington Constitution.

But should this Court proceed without further clarification from the Washington Supreme Court, this Court should apply "rational basis" like the Washington Supreme Court has since 2006.

3. The Ordinance is constitutional under the "rational basis" analysis.

The Ordinance clears the "rational basis" analysis because it is grounded in the public welfare. Resulting from a comprehensive analysis, the Ordinance seeks to reduce barriers to housing for people with a criminal history—barriers that disproportionately impede people of color.

Plaintiffs' one-paragraph effort fails to meet its burden of proving the Ordinance fails the deferential "rational basis" analysis.[144] The only evidence Plaintiffs offer of the "arbitrary nature" of the Ordinance is its exemption for providers of federally assisted housing subject to

[143] *Yim v. City of Seattle* ("*Yim I*"), Wash. Supreme Ct. No. 95813-1 (petition for direct review pending). Plaintiffs rely on the Superior Court's order in *Yim I* without acknowledging the pending appeal. Pls.' Mot. for Summ. J., Dkt. # 23 at 21:19-21.

[144] *Cf.* Pls.' Mot. for Summ. J., Dkt. # 23 at 24:16-25.

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federal regulations requiring denial of tenancy for certain convictions.[145] Local deference to federal law is rational.

4. The Ordinance would pass muster even under the "undue oppression" analysis.

Plaintiffs devote pages to an irrelevant "undue oppression" argument.[146] Even if the "undue oppression" analysis were still valid, Plaintiffs would still not meet their burden of proof.

The "undue oppression" analysis posed three questions: "(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the land owner."[147] Plaintiffs concede the first two questions by not mentioning them. To probe the third question, the Washington Supreme Court borrowed a set of factors that a law review article suggested placing on the "public's" and "owner's" sides of a scale:

> On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.[148]

The public factors favor the City. The barriers to housing posed by landlords denying tenancy to persons with a criminal history—and how those barriers exacerbate racial disparities in housing—is a serious problem to which only landlords contribute. The Council rationally believes the Ordinance provides an effective means of addressing that problem, yet prudently

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[145] *Id*. *See* SMC 14.09.115.B. City App. at SR 613.

[146] Pls.' Mot. for Summ. J., Dkt. # 23 at 21-24.

[147] *Presbytery*, 114 Wn.2d at 330.

[148] *Id.* at 331 (relying on William B. Stoebuck, *San Diego Gas: Problems, Pitfalls and a Better Way*, 25 J. URB. & CONTEMP. L. 3, 33 (1983)).

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directed the City Auditor to study and report on its efficacy by the end of 2019.[149] Plaintiffs try unsuccessfully to cast the problem in broader terms—general "recidivism" and "housing stability"—to argue the Ordinance is "underinclusive," and deny the evidence of Seattle landlords discriminating based on conviction history.[150] Plaintiffs assert the feasibility of other alternatives in one sentence without explanation or proof.[151]

Plaintiffs cannot carry two key "owner" factors. When applying "undue oppression" on the mistaken belief it was unique to claims under the Washington Constitution, the Ninth Circuit in *Laurel Park* concluded "the two most important factors are the fact that the present-day effect on Plaintiffs' property values is little to none and the fact that Plaintiffs may continue to use their properties as they have been used for decades."[152] The Ordinance does not force landlords to stop using their properties for rental units and Plaintiffs allege no impact on their property value. "It would be odd to conclude that an ordinance that had no economic effect on most properties was oppressive at all, let alone unduly oppressive."[153] Even if the Ordinance imposed a direct cost on landlords, "it would be difficult to show undue oppression from the small [amount] involved here."[154]

Plaintiffs misrepresent the "amount and percentage of value loss" factor as a generic "harm" factor, which they then use as an invitation to stir a policy debate over their concerns

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[149] SMC 14.09.110. City App. at SR 612-13.

[150] *Cf.* Pls.' Mot. for Summ. J., Dkt. # 23 at 22.

[151] To the extent Plaintiffs intended to rely on their discussions of alternatives in their free speech argument, the City relies on its discussion of alternatives *supra* Part III.A.3.d.

[152] *Laurel Park*, 698 F.3d at 1194.

[153] *Id.* at 1195.

[154] *Margola Associates v. City of Seattle*, 121 Wn.2d 625, 650, 854 P.2d 23 (1993).

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about the risks allegedly posed by formerly incarcerated persons.[155] Value is the factor, not harm. That key factor favors the City.

So too do most of the other "owner" factors, to which Plaintiffs devote three lines.[156] Given similar laws elsewhere, the "extent to which the owner should have anticipated such regulation" factor favors the City. Plaintiffs do not address the "past, present, and future uses" factor. The City agrees with Plaintiffs that the "feasibility of altering uses" factor is irrelevant, but only because the Ordinance does not force landlords to alter their uses. The City also agrees the "permanency" factor favors Plaintiffs, as it does for most legislation.

Inapposite takings authority about "fundamental attributes of property ownership" and the purpose of the takings clause do not advance Plaintiffs' due process argument.[157] Their argument fails to meet their burden of proof.

C. If any portion of Subsection 2 fails Plaintiffs' constitutional challenges, the remainder of the Ordinance should be severed and enforced.

Plaintiffs challenge only Subsection 2. On First Amendment grounds, they challenge Subsection 2's prohibition on requiring disclosure of, and inquiring about, prospective tenants' criminal history. On substantive due process grounds, they challenge Subsection 2's prohibition on the use of criminal history in selecting tenants. Notwithstanding their limited challenge, they ask the Court to declare the entire Ordinance unconstitutional and enjoin the City from enforcing

[155] Pls.' Mot. for Summ. J., Dkt. # 23 at 22:6, 23:4 – 24:4.

[156] Pls.' Mot. for Summ. J., Dkt. # 23 at 24:5-7.

[157] *See* Pls.' Mot. for Summ. J., Dkt. # 23 at 5:12-14, 21:17-19 (citing the lead opinion in *Manufactured Housing Cmtys. of Wash. v. State*, 142 Wn.2d 347, 363-65, 13 P.3d 183 (2000)); *id*. at 17:19-25 (citing *Yim v. City of Seattle*, Order on Cross Motions for Summary Judgment at 4 (King Cty. Super. Ct. No. 17-2-05595-6, 2018), *pet. for review pending*, Wash. Supreme Ct. No. 95813-1); *id.* at 18:18-21 (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The City reserves its contentions about Plaintiffs' characterizations of these irrelevant takings decisions.

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it.[158]

Plaintiffs ignore the Ordinance's severability clause:

> The provisions of this Chapter 14.09 are declared to be separate and severable. If any clause, sentence, paragraph, subdivision, section, subsection, or portion of this Chapter 14.09, or the application thereof to any landlord, prospective occupant, tenant, person, or circumstances, is held to be invalid, it shall not affect the validity of the remainder of this Chapter 14.09, or the validity of its application to other persons or circumstances.[159]

If this Court accepts either of Plaintiffs' challenges, the Court must leave the remainder of the Ordinance—unchallenged by Plaintiffs—undisturbed, as the City Council intended.[160]

IV. CONCLUSION

The Ordinance is a thoughtful approach to reducing significant barriers to accessing housing facing Seattle residents with criminal histories, disproportionately people of color. Plaintiffs' attacks on Subsection 2 fail. Because it regulates conduct, not speech, Subsection 2 does not implicate the First Amendment. But even if it did, Subsection 2 withstands the intermediate scrutiny governing commercial speech regulation, and would withstand the strict scrutiny Plaintiffs mistakenly invoke. Plaintiffs fail to carry their burden of proving a substantive due process violation under the applicable "rational basis" analysis, and even under the discredited "undue oppression" analysis they mistakenly assert governs their Washington claim.

[158] [Proposed] Order on Pls.' Mot. for Summ. J., Dkt. # 23-1.

[159] SMC 14.09.120. City App. at SR 614.

[160] *U.S. v. Booker*, 543 U.S. 220, 258-59 (2005).

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Because Plaintiffs' challenges fail, the City respectfully asks this Court for summary judgment. But if this Court sustains either of Plaintiffs' challenges, the City asks this Court to sever and uphold the rest of the Ordinance, which Plaintiffs do not challenge.

Respectfully submitted, October 26, 2018,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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